

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-922

SARAH H. WELCOME

vs.

CHILES HOLDINGS LTD., & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Alleging that she had lent defendant Dana M. Chiles approximately \$200,000 that he had not repaid, the plaintiff in July of 2014 filed an action against Chiles individually and various corporate entities related to him.² Chiles never filed an answer, despite the plaintiff's having agreed to extend the time nearly five months to allow him to do so. At the plaintiff's request, the clerk entered a default against Chiles on January 30, 2015, and a default judgment entered on March 16, 2015.³ The defendant moved to vacate the entry of the default

¹ Chiles Development Corp., Dana M. Chiles, and Shoney, LLC.

² The corporate defendants have not participated in this appeal. Our references to "Chiles" refer to the individual defendant.

³ The judgment did not resolve all claims against all parties, but a separate and final judgment was entered pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974).

judgment. After hearing, a Superior Court judge (first motion judge) denied that motion in an order entered on June 5, 2015. On October 15, 2015, the defendant filed a motion for reconsideration of the denial of the motion to vacate. After another hearing, a different judge (second motion judge) denied that motion on October 20, 2015. The defendant filed a notice of appeal on November 2, 2015. For the reasons that follow, we dismiss the appeal in part and affirm the order denying the motion for reconsideration.

Over the course of these proceedings, the defendant successively engaged eight different attorneys to represent him, and at some points in between lawyers, he represented himself. The motion to vacate the default judgment, which Chiles filed himself, was unaccompanied by an affidavit or memorandum of law in support. It also stated no basis for why it should be allowed (beyond a conclusory statement that "I have a meritorious defense to the Plaintiff's complaint [and] I failed to respond due to excusable neglect"). An attorney appeared on Chiles's behalf at the hearing on the motion and requested a continuance. During the hearing, Chiles's newly-retained counsel also addressed the merits of the motion, albeit briefly. He suggested one issue as a potentially meritorious defense: namely, that the plaintiff's claim against the defendant was based on veil-piercing, something that generally can be

difficult to prove. Counsel also argued that excusable neglect was evident based on Chiles's pro se status at the time that the default and default judgment were entered. On the latter point, the plaintiff countered that Chiles had been represented until shortly before she moved for default, and that, in any event, Chiles was a serial litigator who hardly could claim ignorance of the critical importance of filing a timely answer.

The first motion judge denied Chiles's request for a continuance and the motion itself, explaining his ruling in a three-page memorandum and order. The key portion of that memorandum and order states as follows:

"The court concludes that the unverified motion of Chiles [to vacate the default judgment] must be denied in that the defendants have failed to demonstrate that the failure to file a responsive pleading in this action was due to mistake, inadvertence, surprise or excusable neglect.

"Furthermore, there has been no showing of any kind that the defendants will be in a position to set forth a meritorious defense. The court concludes that the action of the defendants, at this time, seeking to continue the hearing, is in all likelihood for the purpose of delaying the proceedings in this matter."

Chiles did not file a timely appeal from the order denying the motion to vacate the default judgment. Nor has he, at any time, sought an extension of time to file such an appeal.⁴ See Mass.

⁴ As noted, Chiles filed a motion for reconsideration months after his motion to vacate the default judgment was denied. No argument can be fashioned that this tolled the appeals period with regard to the order denying the earlier motion.

R. A. P. 4 (c), as amended, 378 Mass. 928 (1979); Mass. R. A. P. 14 (b), as amended, 378 Mass. 939 (1979). Accordingly, to the extent that Chiles now seeks to appeal the order denying his motion to vacate the default judgment, that appeal is not properly before us. See DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 170 (2018).

To the extent that Chiles instead is appealing the order denying his motion for reconsideration of the denial of his motion to vacate the default judgment, that appeal is timely.⁵ However, that appeal does not revive the merits of whether the first motion judge abused his discretion in denying the motion to vacate the default judgment. See Piedra v. Mercy Hosp., Inc., 39 Mass. App. Ct. 184, 186 (1995).⁶

The motion for reconsideration was filed months after the motion to vacate the default judgment was denied. No explanation for this additional delay was offered.⁷ Regarding

⁵ We pass over the fact that the specific wording of the notice of appeal does not directly state that Chiles is pursuing an appeal of the denial of the motion for reconsideration.

⁶ Chiles's characterizing his motion for reconsideration as a motion to vacate a judgment pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), does not change this analysis. See Jones v. Boykan, 464 Mass. 285, 291 (2013), quoting J.W. Smith & H.B. Zobel, Rules Practice § 60.1, at 364 (2d ed. 2006) ("Rule 60 is not a substitute for the normal appellate process").

⁷ Chiles did argue that the motion for reconsideration could be considered timely as a motion to vacate a judgment filed

the underlying merits, Chiles once again asserted that the plaintiff would not have been able to demonstrate veil-piercing. Regarding excusable neglect, Chiles argued that during the relevant time period, he had been "overwhelmed" by a flood of lawsuits brought against him, burdened by health problems, and rendered "in such an emotional state as to be incapable of handling the multitude of business transactions and business decisions that he had to make at that time." Chiles also submitted an affidavit seeking to support such claims. The plaintiff opposed the motion for reconsideration and submitted an affidavit from her counsel that detailed Chiles's dilatory actions throughout the litigation. The affidavit also explained the plaintiff's position that she had loaned the money to Chiles personally and that -- as a result -- his underlying liability did not depend on veil piercing. The second motion judge summarily denied the motion for reconsideration for the reasons set forth in the plaintiff's opposition.

The denial of a motion for reconsideration is subject to review only for an abuse of discretion. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470 (2012). In other words, in order to prevail, Chiles must demonstrate that the second motion judge

pursuant to Mass. R. Civ. P. 60 (b). As previously noted, this explanation was insufficient. See Jones, 464 Mass. at 291.

"made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 343 (2018), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Chiles has not come close to meeting that standard. See Liberty Sq. Dev. Trust v. Worcester, 441 Mass. 605, 611 (2004) (judge not required to consider motion for reconsideration that amounts to "belated effort[] to improve on [party's] original motion"). See also Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 312-313 (2009) (judge acted within his discretion in deeming arguments raised for first time in motion for reconsideration waived).⁸ In fact, the second motion judge could have refused even to entertain the motion for reconsideration, because that motion failed to "specify (1) 'changed circumstances' such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision." Audubon Hill, 82 Mass. App. Ct. at 470. Such considerations "apply with special force" where,

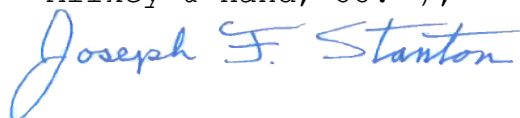
⁸ It bears noting that some of the arguments that Chiles now makes regarding the underlying merits were not raised even in the motion for reconsideration; rather, they are being raised for the first time on appeal. As such, these arguments are not even properly before us. Green v. Brookline, 53 Mass. App. Ct. 120, 128 (2001).

as here, Chiles already had been given "a written, reasoned explanation of [the original] ruling." Id.

So much of the appeal as seeks review of the order entered June 5, 2015, denying the defendant's motion to vacate default judgment is dismissed. The order entered October 20, 2015, denying the defendant's motion for reconsideration is affirmed.⁹

So ordered.

By the Court (Wolohojian,
Milkey & Hand, JJ.¹⁰),



Clerk

Entered: July 15, 2019.

⁹ The plaintiff has requested attorney's fees for having been required to defend this appeal. Although we find the defendant's appeal exceptionally weak, we do not consider it "wholly insubstantial, frivolous, and not advanced in good faith." G. L. c. 231, § 6F. The plaintiff's request for reasonable appellate attorney's fees is therefore denied.

¹⁰ The panelists are listed in order of seniority.